MOTION FILED

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No. 00-1491

In The

Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,

Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER.

Pursuant to Rule 37.2 of the rules of this Court, the National Association of Independent Insurers (hereinafter "NAII") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner, John Deere Insurance Company (hereinafter "John Deere"). Petitioner has given its consent to NAII to file its *amicus brief*. The NAII further states that the respondent has witheld consent. Letters from both petitioner and respondent were submitted to the Court with this brief.

The NAII is a leading voice in the insurance industry. The NAII is the largest property and casualty insurance trade association in the United States in terms of the number of total member insurance companies and in terms of total premium dollars written by its more than 600 member insurers.

Members of the NAII transact business, offer insurance products, investigate claims, mediate and settle disputes and provide legal defense to millions of corporate and individual policyholders across the United States. Companies of every size and type comprise the NAII from companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast.

One significant population of insurance consumers served by the NAII membership is the trucking industry. The NAII and its member companies are deeply concerned about the issues raised by John Deere in this case. The NAII believes that unambiguous insurance contracts

should be interpreted as they are written. The NAII further supports the Constitution's express prohibition barring any state from passing any law impairing the obligations in contracts entered into by the contracting parties. The NAII further supports this Court's ruling in *Lynch v. United States*, 292 U.S. 571 (1934) where this Court held that the Due Process Clause of the Fifth Amendment creates essentially the same ban on the federal government.

The NAII and its membership believe that endorsement MCS-90 can not constitutionally be interpreted to expand insurance coverage to individuals that are not insureds under an unambiguous insurance policy contract. The NAII and its members aver that endorsement MCS-90 can not constitutionally be read to require insurers to provide coverage for non-covered automobiles not specifically contemplated by an unambiguous insurance policy contract. Any conclusion to the contrary may violate the spirit of Article I, Section 10(1) and the Fourteenth Amendment of the Constitution, and that the Ninth Circuit's expansive application of MCS-90 here clearly violates the Fifth Amendment of the Constitution.

This Court should grant John Deere's petition for a writ of certiorari so that this Court can reconcile the apparent conflict between the language of endorsement MCS-90 and the Fifth Amendment of the Constitution. Moreover, this Court should further grant John Deere's petition for a writ of certiorari because the rulings made by the United States Court of Appeals for the Third, Fifth, Eighth and District of Columbia Circuits on the important issue raised by John Deere are in conflict with rulings in

the United States Court of Appeals for the Ninth and Tenth Circuits. Finally, the NAII and its member companies further urge this Court to grant John Deere's petition for a writ for certiorari because the effect of the Ninth and Tenth Circuits rulings may have a substantial impact on the premiums charged to consumers of commercial liability insurance policies. The Ninth and Tenth Circuits' rewrite of clear policy language and their expansive reading of endorsement MCS-90 will require insurers like John Deere and others to be responsible for the payment of losses that are clearly not required under their policy nor endorsement MCS-90 and which were not bargained for nor contemplated by the parties at the time of issuance of the insurance policy. The additional financial obligations that insurers will be required to face under the Ninth and Tenth Circuits' rulings may have a serious impact on the overall cost of insurance to consumers across the nation.

For these reasons, the NAII hereby respectfully requests that this Court grant the NAII's motion to file its brief *amicus curiae* and further requests that this Court grant John Deere's petition for a writ of certiorari.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The statement of interest of *Amicus Curiae* the National Association of Independent Insurers (hereinafter "NAII") is fully set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The United States Constitution prohibits states and the federal government from passing any law that impairs the rights and obligations of private parties in contracts. This constitutional prohibition has been recognized and enforced by this Court, as well as numerous federal appellate and state courts across the nation.

Legislatures and courts are prohibited from rewriting the material terms and conditions of existing insurance contracts under the Fifth Amendment of the United States Constitution. Generally, legislation that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void.

In the instant case, the express terms of MCS-90 apply only to the duties and obligations of the insurer and the insured identified in the policy. There is clearly no coverage under the John Deere policy for automobiles that are not contemplated within the meaning of the

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

policy and likewise there is no coverage afforded under this policy or the MCS-90 endorsement for any person or entity that is not a party to the contract. The express terms and conditions of endorsement form MCS-90 are consistent with these principles. Endorsement form MCS-90 specifically provides that its terms and conditions apply only to the parties to the insurance contract, namely, the insurer and the insured.

The Ninth Circuit's attempt to expand the scope of coverage provided under either the John Deere policy or MCS-90 expands the nature and type of losses that the insurer is required to pay. The Ninth Circuit's decision further expands the parties to which the insurer is required to pay. The Ninth Circuit's ruling here clearly constitutes a prohibited expansion or modification of the significant terms and conditions of a contract. The Constitution clearly prohibits judicial expansion of key contract provisions without the authorization and consent of the parties to that contract.

A basic and cherished principle in this nation is that the rights of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. If the freedom to contract under the Constitution is to retain any meaning at all, it must be understood that it does impose limitations upon the power of legislatures to abridge existing contractual relationships.

Government intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise. Such interference with private citizens' right to contract clearly violates the central freedoms afforded under the Constitution.

The Ninth Circuit's ruling joins the decision reached by the Tenth Circuit in *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996), where that court also modified and expanded the clear meaning of the MCS-90 endorsement. Until the Ninth Circuit ruled in the instant case, the Tenth Circuit stood alone as the minority viewpoint as to the scope of coverage afforded under the MCS-90. The Tenth Circuit has for more than two decades interpreted the MCS-90 endorsement in a manner contrary to that of its sister federal courts of appeal. A clear conflict now exists between the federal courts of appeal on the scope of coverage afforded by the MCS-90. For this reason alone, this Court should grant John Deere's petition for a writ of certiorari.

The *Amicus* acknowledges that the right to freely contract is not absolute. There are certain limited and exceptional circumstances where a legislature may alter private contracts and such legislative acts will withstand constitutional challenge. However, the Ninth Circuit failed to identify that any limited or exceptional circumstances existed in the instant case that justified its redrafting of the clear and unambiguous language in the John Deere policy and the MCS-90 endorsement. Thus, the Ninth Circuit had no basis to substantiate its ruling that expands the scope of coverage afforded under the MCS-90 endorsement.

The decision of the Ninth Circuit must be vacated by this Court and the rights of John Deere and its insured to be bound only by the clear and express terms and conditions of the insurance policy and MCS-90 endorsement must be reinstated. Otherwise, if the Ninth Circuit's decision and expansive reading of the MCS-90 is permitted to

stand, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise unambiguous private contract. Furthermore, individuals across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a state or federal legislature.

ARGUMENT

I. JOHN DEERE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S EXPANSION OF THE INSURANCE COVERAGE AFFORDED UNDER THE JOHN DEERE POLICY AND THE MCS-90 ENDORSEMENT VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Any Legislative Enactment That Imposes Additional Duties Or Responsibilities On Parties To A Contract Is Void If It Produces A Change In The Obligations Or Substantial Rights Of A Party.

This Court should grant John Deere's petition for a writ of certiorari because the effect of the Ninth Circuit's ruling clearly creates an unconstitutional expansion of John Deere's duties and obligations under its insurance policy.

Article I, section 10, of the United States Constitution provides that no state shall pass any bill or law that

impairs the obligations of parties to contracts. U.S. Const. art. I. *See also, Tidal Oil v. Flanagan,* 263 U.S. 444 (1924). Although no explicit constitutional language protects the sanctity of contract against federal legislation, this Court has held that the Due Process Clause in the Fifth Amendment contains essentially the same effect. *Lynch v. United States,* 292 U.S. 571 (1934) (invalidating Congressional attempts to cancel certain types of insurance policies). Both the federal and states' constitutions prohibit the enactment of laws impairing the obligations of contracts. *Superior Motors, Inc. v. Winnebago Indus., Inc.,* 359 F.Supp. 773, 777 (D.S.C. 1973). For nearly two centuries, this Court has steadfastly invalidated legislative acts that substantially impair or affect the contractual rights of parties. *See generally, Fletcher v. Peck,* 10 U.S. 87 (1810); *College v. Woodward,* 17 U.S. 518 (1819); *New Jersey v. Wilson,* 11 U.S. 164 (1834); *Perry v. United States,* 294 U.S. 330 (1935).

Generally, legislation that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void. 16A C.J.S. Constitutional Law, section 353 et seq. Of this character are statutes that attempt to add a material condition or provision to a contract and those which attempt to release stipulations therein. *Id.* It may be said that a legislative enactment impairs the obligations of a contract when it attempts to take from a party a right that he is entitled to by its terms. *Superior Motors, Inc.,* 359 F.Supp. at 773. Thus, legislation which attempts to make material alterations in the character, terms or legal effect of an existing contract impairs the obligations of that contract. *Id.* at 777. Moreover, statutes are void if they impose added conditions or

duties on parties to a contract. *Id. See also,* 16A C.J.S. Constitutional Law, section 353 et seq.

Other material alterations that would impair the obligations of contracts are those that alter the extent of liability under a contract or which empower courts to rewrite contractual agreements substantially. 16A C.J.S. Constitutional Law, section 353 et seq.

In the instant case, the express terms of MCS-90 apply only to the duties and obligations of the insurer and the insured identified in the policy. There is clearly no coverage under the John Deere policy for automobiles that are not contemplated within the meaning of the policy and likewise there is no coverage afforded under this policy or the MCS-90 endorsement for any person or entity that is not a party to the contract. The express terms and conditions of endorsement form MCS-90 are consistent with these principles. Endorsement form MCS-90 specifically provides that its terms and conditions apply only to the parties to the insurance contract, namely, the insurer and the insured.

Any attempt to expand the scope of coverage provided under either the John Deere policy or MCS-90 that would expand the nature and type of losses that the insurer is required to pay, or that which expands the parties on behalf of which the insurer is required to pay, clearly constitutes a prohibited expansion or modification of the significant terms and conditions of a contract. The Constitution clearly prohibits such an expansion of key contract provisions without the authorization and consent of the parties to that contract.

A basic and cherished principle in this nation is that the right of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. *See generally, Hedge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C.Cir. 1983). If the freedom to contract under the Constitution is to retain any meaning at all, it must be understood that it does impose limitations upon the power of legislatures to abridge existing contractual relationships. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). This constitutional guarantee is not limited to individuals. Commercial parties are also afforded constitutional protections to enter into contracts freely and to accept only those terms and conditions that they desire to undertake. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3rd Cir. 1980).

Here, the effect of the ruling by the Ninth Circuit is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The Ninth Circuit's expansive interpretation of the John Deere policy and MCS-90 imposes new duties and obligations on the insurer that (1) are not set forth in the actual policy language nor in the language of MCS-90, (2) were not agreed to by the insurer and the insured, and (3) are not part of the insurance policy and MCS-90 endorsement actually issued to the policyholder. The Ninth Circuit has essentially rewritten the material terms and conditions of the John Deere policy and endorsement MCS-90 without the parties' consent. This unilateral expansion of coverage afforded under the John Deere policy and MCS-90 by the

Ninth Circuit violates the Constitution's guarantees of freedom to contract.

Accordingly, this Court should grant John Deere's petition for a writ of certiorari so that the freedom to contract freely will continue to be upheld as one of the central freedoms afforded to the citizenry of the United States.

B. The Effect Of The Ninth Circuit's Ruling Renders An Unconsitutional Application Of MCS-90 Because It Substantially Changes John Deere's Rights Under Its Insurance Policy.

Any legislation that alters the extent of an insurer's liability under an insurance policy contract or which empowers courts to substantially re-write an insurance policy's terms and conditions is unconstitutionally invalid. *See generally,* 16A C.J.S. Constitutional Law, section 353 et seq.

In this case, the John Deere policy at issue was amended and supplemented by endorsement MCS-90, which was required by law to be added to Motor Carrier Liability Policies pursuant to sections 29 and 30 of the Motor Carrier Act of 1980, 49 U.S.C. Section 10927. *John Deere v. Neuva, et al.,* 229 F.3d 853 (9th Cir. 2000). The MCS-90 endorsement was required to be attached to any liability policy issued to a certified interstate carrier. 49 C.F.R. section 1003.3. The MCS-90 provided:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer agrees to pay, within the limits of liability described herein, any final judgment

> recovered ***against the insured*** for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980, regardless of whether or not each motor vehicle is specifically described in the policy. . . . It is understood and agreed that no condition, provision, stipulation, or limitations in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from any payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy ***of the insured***. However, all terms, conditions and limitations in the policy to which this endorsement is attached shall remain in full force and effect as binding between ***the insured*** and the company. ***The insured*** agrees to reimburse the company for any payment made by the company on account of any accident, claims or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

John Deere, 229 F.3d at 968. (Emphasis added).

By requiring all such described insurance policies to contain this endorsement, the ICC sought to prevent the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public. *See, Empire Fire & Marine Ins. Co. v. Guaranty Nat'l Ins. Co.*, 868 F.2d 357 (10th Cir. 1989). Said another way,

the endorsement was designed to eliminate the possibility of a denial of coverage by an insurer based upon an "excess" or "other insurance" clause or any other provision limiting provisions contained in the policy. *John Deere*, 229 F.3d at 855.

The *Amicus* believes the Ninth Circuit erred when it ignored the unambiguous language of the policy and endorsement MCS-90 and instead expanded the scope of coverage to an extent not contemplated by the parties. The language of the endorsement is clear. The endorsement only contemplates two parties to the policy – the insurer and *the insured*. Any party not specifically contemplated within the policy's definitions of insured has no valid claim for coverage under either the policy or the MCS-90 endorsement. This clear and unambiguous language in both the policy and endorsement MCS-90 was ignored by the Ninth Circuit Court.

The MCS-90 endorsement has been interpreted to apply only to the insurer and to the insured by federal appellate courts. In *Wellman v. Liberty Mutual Ins. Co.*, 498 F.2d 131 (8th Cir. 1974), the Eighth Circuit court rejected the petition that the MCS-90 endorsement and the policy to which it was attached afforded any rights to any party other than the insurer and the insured.

Similarly, in *Carolina Ins. Co. v. Insurance Co. of N. Am.*, 595 F.2d 128 (3rd Cir. 1979), the court held that duties and responsibilities in the MCS-90 endorsement applied only to the insurer and to the insured. Indeed, numerous other courts have also taken the view. *See generally, White v. Excalibur Ins. Co.*, 559 F.2d 50 (5th Cir.), *cert. denied*, 444 U.S. 965 (1975); *Radman v. Jones Motor Co.*,

Inc., 914 F.Supp. 1193 (W.D.Pa. 1996), *aff'd*, 100 F.3d 948 (3rd Cir. 1996) (court adopted the rationale in *Wellman*); *Del Real v. United States Fire Ins. v. Crum & Forster*, 64 F.Supp.2d 958 (E.D.Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999); *Pratt v. Andrews*, 164 Ill.App.3d 606; 518 N.E.2d 184 (1987); *Nowak v. Transport Indem. Co.*, 120 Wis.2d 635, 358 N.W. 2d 294 (Wis.Ct.App. 1984); *Transport Indemn. Co. v. Teter*, 575 S.W.2d 780 (Mo.Ct.App. 1978).

The Ninth Circuit's ruling runs afoul of the long line of decisions by this Court and courts across the nation that protect the right to freely contract. This ruling has further fueled an existing conflict among the federal circuit courts of appeal on the scope of the MCS-90 endorsement and conveys an ambiguous and mixed message as the issue of whether state and federal legislatures can unilaterally re-write the terms and conditions of existing contracts.

The Ninth Circuit's ruling joins the decision reached by the Tenth Circuit in *Adams v. Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996), wherein that court also modified and expanded the clear meaning of the MCS-90 endorsement. Until the Ninth Circuit ruled, the Tenth Circuit stood alone as the minority viewpoint as to the scope of coverage afforded under the MCS-90. The Tenth Circuit has for more than two decades interpreted the MCS-90 endorsement in a manner contrary to that of its sister federal courts of appeal. *See, generally*, 157 A.L.R.Fed. 549 ("The Tenth Circuit is the federal circuit that espouses the "minority" view . . . "). A clear conflict now exists between the federal courts of appeal on the scope of coverage afforded by the MCS-90. For this reason alone,

this Court should grant John Deere's petition for a writ of certiorari.

Government intermeddling with business, essentially private in nature, is repugnant to the fundamental concept of free enterprise. *Superior Motors, Inc.*, 359 F.Supp. at 778. Such interference with private citizens' right to contract clearly violates the central freedoms afforded under the Constitution. The Ninth and Tenth Circuit courts of appeal have misconstrued the plain meaning of the MCS-90 endorsement and have created a conflict in the law where one should not exist. This Court has historically protected the rights of this nation's citizens to freely contract. These rights are not in jeopardy in light of the minority view espoused by the Ninth and Tenth Circuit courts of appeal. This Court should grant John Deere's petition for a writ of certiorari here to prevent future confusion by state and federal courts on the issue of the scope of coverage afforded under MCS-90, and moreover to prevent any further deterioration of the rights of this nation's citizens to freely contract. For these reasons, *Amicus Curiae* the NAII respectfully requests that this Court grant John Deere's petition for a writ of certiorari.

II. GOVERNMENT ALTERATIONS OF PRIVATE CONTRACTS ARE PERMITTED ONLY IN LIMITED AND EXCEPTIONAL CIRCUMSTANCES, NONE OF WHICH ARE PRESENT HERE.

The *Amicus* acknowledges that the right to freely contract is not absolute. There are certain limited and exceptional circumstances where a legislature may alter

private contracts and such legislative acts will withstand constitutional challenge.

The first exceptional circumstance where a legislature may alter private contractual terms and conditions is where the parties to the contract affected by the modification give their consent to such alteration. *See, generally,* 16A C.J.S. Constitutional Law, section 344. In the instant case, there are no facts that suggest that John Deere or its insured gave consent to the ICC, the United States Department of Transportation, or to the Ninth Circuit court to modify the John Deere policy or the MCS-90 endorsement. Clearly, the "consent" exception is inapplicable here.

During periods of emergency, alterations are sometimes authorized and held not unconstitutional as an impairment of the contractual obligation. *See generally,* 16A C.J.S. Constitutional Law, section 344. Again, the record contains no evidence that any pressing emergency justified the Ninth Circuit's expansion of coverage afforded by John Deere to its insured under its policy or the MCS-90 endorsement. In the absence of any evidence of any such exigent circumstances, the "emergency" exception clearly did not apply so as to warrant the Ninth Circuit's redrafting of the John Deere policy and the MCS-90 endorsement in the instance case.

A legislature may also exercise the right to alter private contracts where the interests of the public welfare are at stake. The Ninth Circuit applied this "public welfare" circumstance to justify its expansion of the coverage afforded by the John Deere policy and the MCS-90 endorsement. The Ninth Circuit court reasoned:

> The [insureds] in the instant case are injured members of the public, and thus are precisely the group meant to be protected by the MCS-90.

John Deere, 229 F.3d at 857. The *Amicus* suggests that the mere fact that the insureds were "members of the public" in and of itself was insufficient reason to justify the Ninth Circuit's intrusion into the private contract between John Deere and its insured. The *Amicus* suggests that the "public welfare" exception that permits alteration of private contracts in some circumstances should only apply where there is a clear danger that the public's health and safety may be at imminent risk.

The MCS-90 was designed only to serve as a reimbursement mechanism for losses. There is no provision in the MCS-90 that requires any party to undertake any safety-related or health-related measures to further the interests of "public welfare." The MCS-90's reimbursement mechanisms do nothing to reduce risks of injuries to common carriers. To the contrary, the duties and obligations imposed upon the insurer and the insured under the MCS-90 endorsement are triggered only after there has been a loss or injury.

The Ninth Circuit's reliance upon the "public interest" circumstance is misplaced and is clearly not justified upon closer examination of the workings of the MCS-90. Where the MCS-90 does not require risk management, inspections, the implementation of safety processes, or does anything in any way to directly prevent or reduce the risk of harm to the "public," there is no "public interest" to justify the Ninth Circuit's invasion into the private right of contract between private citizens. Said another way, the MCS-90 endorsement acts only as a

predetermined method of allocation or reimbursement of loss costs between the insurer and its insured. This function does not relate to the "public interest" in any way contemplated by the "public interest" circumstance that affords a legislature license to alter private contracts. Accordingly, the Ninth Circuit's reliance upon this exception is not justified in the instant case.

Because the Ninth Circuit failed to identify that any limited or exceptional circumstance existed to justify its redrafting of the clear and unambiguous language in the John Deere policy and the MCS-90 endorsement, the Ninth Circuit had no legal basis to substantiate its ruling that expanded the scope of coverage afforded under the MCS-90 endorsement.

The decision of the Ninth Circuit must be vacated by this Court and the rights of John Deere and its insured to be bound only by the clear and express terms and conditions of the insurance policy and MCS-90 endorsement must be reinstated. Otherwise, if the Ninth Circuit's decision and expansive reading of the MCS-90 is permitted to stand, a mixed message will be sent to courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise unambiguous private contract. Furthermore, individuals across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a state or federal legislature, or by a court.

Accordingly, the *Amicus* NAII respectfully requests that John Deere's petition for a writ of certiorari be granted by this Court.

CONCLUSION

Amicus Curiae National Association of Independent Insurers respectfully requests that John Deere's petition for writ of certiorari be granted.

Respectfully submitted,

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April 12, 2001